

DATE: April 9, 1998

SUBJECT: MOTION AND PETITION PRACTICE

1. Motions panel.

Each month, the chief judge appoints a three-judge motions panel and designates a lead judge.

2. Clerk.

(a) Before the appeal has been calendared, the clerk may grant a motion grantable during that period and specified in Fed. Cir. R. 27(f) which contains a representation that the motion has the consent of the parties.

(b) After the appeal has been calendared, the clerk shall refer all motions specified in Fed. Cir. R. 27(f) to all members of the merits panel.

(c) Notwithstanding representations of consent, the clerk may decline to grant a motion if its allowance would be a substantial divergence from routine practice before the court. The clerk shall refer such a motion to the Senior Staff Attorney (SSA) if the appeal has not been calendared and to the merits panel if the case has been calendared.

3. Senior Staff Attorney (SSA).

All precalendar motions requiring action by a judge or judges of the motions panel will be delivered by the clerk to the SSA, who shall be responsible for assisting the motions panel in the processing of such motions.

4. Prepaneling motions.

The clerk transmits to the SSA a motion or response filed before the case is assigned to a merits panel. When its nature permits, a motion filed after the principal briefs have been filed may be held by the clerk for delivery to the merits panel with the briefs and materials in the case. When a motion is under consideration by a motions panel and has not been referred to a merits panel, all papers subsequently filed in relation to that motion, and without regard to expiration of the motions panel's term of service, will be acted upon by that motions panel.

(a) Non-emergency motions.

(i) When it is not necessary that a motion be granted or denied before the case can be expected to be assigned to a merits panel, the motion may be deferred for consideration by a merits panel. Though a merits panel need not exist at time of deferral, care should be exercised to avoid both undue delay in disposing of the motion and unnecessary preparation and filing of briefs and appendices resulting from early deferral of a potentially dispositive motion.

(ii) The SSA notifies the clerk of deferral to a merits panel and returns the motions papers to the clerk. The clerk includes a copy of the motions papers with the briefs and materials when they are transmitted to each judge on a merits panel. The motion will then be considered and decided as part of the determination of the merits of the case.

(b) Emergency motions.

The SSA presents emergency motions promptly to the lead judge, who then elects to decide the motion alone or to obtain a decision by the motions panel.

(c) Dispositive motions.

Orders disposing of an appeal or a petition (dismissal, summary affirmance, mandamus, etc.) must reflect action by the full motions panel. The captions on such orders will bear the names of all panel members.

5. Oral argument.

(a) Oral argument will not ordinarily be granted on prepaneling motions. Nonetheless, a motions panel may elect: (i) to hear oral argument when deemed necessary and the nature of the case so warrants; (ii) to hear oral argument after expiration of its term of service when it has devoted sufficient judge time to make consideration of the motion by a merits panel or other judges an unnecessary duplication; or (iii) to be reconstituted as a merits panel for consideration of the motion as part of its determination of the case. The chief judge will be notified when (i), (ii), or (iii) is elected.

(b) A merits panel may permit oral argument directed to a deferred motion as part of argument on the merits, instructing the clerk to notify counsel whether additional time will be granted for that purpose and the amount of that time.

6. Postpaneling, presubmission motions.

(a) Motions filed after the briefs and materials have been delivered to a merits panel, but before the case is under submission, will be referred by the

clerk to the merits panel, which will decide the motion either before submission or as part of its determination of the whole case after submission.

(b) The action chambers on a post-calendar motion shall be that of the judge who has been assigned the responsibility of authoring, or who has authored the opinion. If a post-calendar motion requires action before hearing, the presiding judge of the merits panel will preassign the opinion-authoring responsibility, subject to reassignment after the hearing if necessary. The authoring judge will decide whether to act alone on a motion or to obtain the views of the other merits panel members (in conference or by vote sheet).

(c) To avoid premature disclosure of the merits panel membership, orders issued by a merits panel will ordinarily be signed by the clerk.

7. Postsubmission motions.

All postsubmission motions are referred to the members of the merits panel, and shall not ordinarily be argued. The action chambers shall be that of the authoring judge.

8. Reconsideration.

A motion for reconsideration of a decision on a motion is referred to the members of the motions panel or merits panel that decided the motion.

9. Petitions for writs of mandamus.

Petitions for writ of mandamus will be processed in the manner set forth above with respect to motions.

10. Precedential orders disposing of motions.

(a) Orders disposing of motions may be made precedential when deemed advisable by the motions panel or merits panel, applying the criteria of

IOP # 10. Explanation of the basis for the order may take the form of, but shall not be labeled as, an opinion.

(b) Precedential orders will reflect membership of the motions panel or merits panel and will be signed by the order-authoring judge, who will normally be the lead judge or presiding judge. Precedential orders issued by a single judge will be signed by that judge.

11. A motions panel that grants a motion to expedite an appeal may decide, by majority vote, to sit as the merits panel.